suited him to say: "Well I signed this. I understood it. I signed it consciously but I signed it with the mental reservation that if necessary I would not accept it as binding upon me." If such evidence were admissible to invalidate a written contract then the whole fabric of our commercial life would fall to the ground.

In the circumstances and for these reasons I would dismiss the appeal with costs.

Hill and **Barakbah JJ.A.** concurred.

Appeal dismissed.

Solicitors: *Goh Bin Lay; Boswell, Hsien & Lim.*

LIM FOO YONG LTD. v. THE COLLECTOR OF LAND REVENUE

[P.C. (The Lord Chancellor (Lord Dilhorne), Lord Jenkins and Lord Pearce) November 27, 1962]

[Privy Council Appeal No. 14 of 1961]

Land Acquisition — Appellants owners of 2 pieces of land — Land not contiguous to each other but separated by strip of land 165 ft. in other ownership — Collector compulsorily acquiring one piece of land — Award of compensation based on market value — Award not taking account of severance or injurious affection to land not acquired — Damages — Method of calculating — Land Acquisition Enactment (Cap. 140), s.29.

The appellants owned two pieces of land 2.3 and 4.2 acres respectively which were not contiguous to each other but the shortest distance between them was 165 ft. The appellants proposed to construct on the latter (hereinafter referred to as the hotel land) a first class hotel of international standards and on the former a swimming pool, two tennis courts, a badminton court, a sports pavilion and a car park so as to enhance the amenities of the hotel. This former piece of land (hereinafter referred to as the acquired land) was compulsorily acquired by the respondents who awarded $60,000 as full compensation. This was in respect of its market value. The Collector awarded nothing in respect of damage to the company's other land either on account of severance or of injurious affection. Before the trial judge the appellants claimed that the assessment of the market value of the acquired land was too low and sought also to establish that they had suffered damage by reason of severance. Ong J. (after having heard the evidence and inspected the two premises) awarded $202,280 in respect of the acquired land. The learned judge also awarded as compensation for damages by reason of severance under section 29(i)(c) an additional sum of $276,240. Both parties appealed. The Court of Appeal held that severance was established and therefore the appellants were entitled to compensation under section 29(i)(c). The Court of Appeal also held that the amount awarded by Ong J. was calculated erroneously because (i) the principle in *British Transport Commission* v. *Gourley* (1) had no application in cases such as this where the difference in rental and so of income of the appellants is used solely for the purpose of determining the loss of capital value of the hotel land due to severance, (ii) the learned trial judge erred in calculating the loss by severance in that he failed to take account of the amount to be awarded as the market value of the land acquired, with the result that the appellants were in effect to be paid twice over for the land taken from them. Further the court held that the appellants failed to discharge the onus of proof of establishing that they had suffered any damage by reason of severance. On appeal,

Held: (1) in the circumstances of this case, the fact that on the appellants' calculation the loss in value of the hotel land was so very substantial as a result of being deprived of the use for recreational purpose of a piece of land not contiguous to the hotel land to which there was access over land in other ownership gives rise to grave doubts as to the accuracy of their claim;

(2) the appellants failed to satisfy the Board that the Court of Appeal were wrong in rejecting the award made by the trial judge;

(3) it was for the appellants to establish that they had suffered damage in the diminution of the value of the hotel land due to severance and they failed to prove that they suffered any such damage.

Case referred to:—

(1) *British Transport Commission* v. *Gourley* [1956] A.C. 185.

PRIVY COUNCIL APPEAL.

Viscount Bledisloe, Q.C., G. A. Grove and *Yong Pung-How* for the appellants.

R. D. Stewart Brown, Q.C., and *P. G. Clough* for the respondent.

The judgment of the Lords of the Judicial Committee of the Privy Council was delivered by,

The Lord Chancellor: This is an appeal from the Court of Appeal of the Supreme Court of the Federation of Malaya allowing in part an appeal from an award of compensation by Ong J. (sitting with two assessors) in respect of 2.3 acres (101,140 sq. ft.) of land at Kuala Lumpur which was compulsorily acquired from the appellants by virtue of the Land Acquisition Enactment, Chapter 140.

The appellants also owned other land, 4.2 acres (183,000 sq. ft.) in extent, on which they planned to build a first class hotel, judged by international standards. This land, which can conveniently be referred to as "the hotel land", was not contiguous to the land compulsorily acquired; the shortest distance between the hotel land and the acquired land is 165 feet. In 1956 an agreement had been made with the owners of the intervening land by Mr. Lim Foo Yong whereby he was allowed to use an existing footpath between the hotel land and the acquired land.

The appellants proposed to construct on the acquired land, not only a swimming pool with seating for spectators but also two tennis courts, a badminton court, a sports pavilion and a car park, and so enhance the amenities of the hotel.

They claimed compensation under two heads, first for the value of the land acquired and secondly for the damage alleged to have been suffered by them by reason of the acquisition.

The latter claim was made by virtue of section 29 of the Land Acquisition Enactment the relevant provisions of which are as follows:—

(i) in determining the amount of compensation to be awarded for land acquired under this enactment, the court shall take into consideration the following matters and no others, namely:

(*a*) the market value at the date of the Publication of the notification .....;

(*b*) .....;

(*c*) the damage, if any, sustained by the person interested at the time of the Collector's taking possession of the land by reason of severing such land from his other land;

(*d*) the damage, if any, sustained by the person interested at the time of the Collector's taking possession of the

land by reason of the acquisition injuriously affecting his other property whether movable or immovable in any other manner or his actual earnings.

The date of publication of the notification was the 11th October 1957 and the appellants consented to the Collector taking possession on the 12th October 1957.

The Collector awarded to the appellants the sum of 60,000 dollars as full compensation for the acquired land. This was in respect of its market value. He awarded nothing in respect of damage to the Company's other land either on account of severance or of injurious affection. His offer of this sum was not accepted and the matter was referred to the Court.

Before the Court the appellants claimed that the assessment of the market value of the acquired land was too low and sought also to establish that they had suffered damage by reason of severance. They did not seek to prove that they had suffered damage by reason of injurious affection in any other manner or by loss of actual earnings.

Ong J., having heard the evidence and having inspected the hotel land and the acquired land in October 1959, valued the acquired land at 2 dollars per square foot and accordingly awarded 202,280 dollars in respect of it. He also awarded as compensation for damage by reason of severance under section 29(i)(*c*) an additional sum of 276,240 dollars. No award of compensation was made under any other head.

Ong J. found as a fact that, "by reason of the acquisition, the owners (the appellants) are permanently disabled from providing for the hotel the swimming pool and recreational facilities which they could have done" on the acquired land. He said that in his opinion "the swimming pool and recreation ground could not be carved out of the existing car park area, because among other things an adequate parking space for cars was essential to a hotel of this size in that locality".

He also found as a fact that by reason of the acquisition the appellants had suffered substantial financial loss from the reduction of the rental value of their hotel.

Ong J. held that in view of these findings of fact it followed as a necessary corollary thereto that the owners had been damnified or injuriously affected by reason of the acquisition causing a severance.

On the 8th July 1957 a Mr. Lim Joo Tan had written to the appellants asking for their confirmation of the terms verbally agreed two days earlier for the lease to him of the new hotel. It was stipulated *inter alia* that the hotel should have 200 air conditioned rooms, its own grounds with adequate car parking facilities, a swimming pool, tennis and badminton facilities and recreational facilities, that the rental should be 50,000 dollars a month and that the lease should be for 5 years with an option of renewal. On the 12th July 1957 the appellants agreed to these terms.

In November 1957 Mr. Lim Joo Tan agreed with the appellants that the rent should be reduced to 35,000 dollars a month in consequence of the acquisition of the land intended to be used for a swimming pool and recreational facilities.

The appellants quantified their claim for compensation for severance by calculations based on the difference between the rent agreed for the hotel land and acquired land as one unit and that subsequently agreed for the hotel land alone. Ong J. and the assessors were of the opinion that the monthly rent of the hotel land alone should not be 35,000 dollars but of the order of 40,000 dollars a month and he based his assessment of the compensation for revenue on calculations founded on an assumption of a decrease of rent of 10,000 dollars a month.

Both parties appealed. The Court of Appeal held that severance was established. The appellants were therefore entitled to compensation under section 29(i)(*c*) if it was shown that they had suffered damage by reason thereof.

It also held that the amount awarded by Ong J. was calculated erroneously in two respects. The first was that he applied the principle in *British Transport Commission* v *Gourley* [1] to his estimation of the annual loss of income which would be suffered by the appellants as a result of the reduction in rent. The principle in that case however has no application in a case such as this where the difference in rental and so of income of the appellants is used solely for the purpose of determining the loss of capital value of the hotel land due to severance. Secondly he erred in calculating the loss by severance in that he failed to take account of the amount he awarded as the market value of the land acquired, with the result that the appellants were in effect to be paid twice over for the land taken from them.

Before their Lordships' Board it was conceded that the Court of Appeal were right in so holding.

Further, by a majority, the Court of Appeal having considered the figures and facts found by Ong J. came to the conclusion that the appellants had failed to discharge the onus of proof, which it was conceded before their Lordships' Board lay upon them, of establishing that they had suffered any damage by reason of severance.

It was contended by the appellants that the Court of Appeal was wrong in so holding and that the Court should have accepted the findings and figures of Ong J. corrected to take account of the two errors referred to. The appellants contended that while the most direct method of determining whether there was any loss by reason of severance was to ascertain the market value of the hotel land and acquired land as one unit and then to deduct from that the total of the market value of the hotel land and of the

acquired land separately assessed, in this case the value of the land in each case should be determined by ascertaining its annual yield and then capitalising the amount.

Before their Lordships' Board they formulated their claim as follows:—

Annual loss of rent of hotel at 10,000 dollars a month	$120,000
Less municipal assessment at 26%	$ 31,200
	$ 88,800
At 8 years' purchase	$710,400
Less capital outlay which would have been incurred on the acquired land	$150,000
	$560,400
Less value of acquired land	$202,280
	$358,120

Their Lordships do not doubt that this is a perfectly proper method of valuation. The reliability of the final figure depends on the accuracy of the estimation of the annual loss of rent.

As has been pointed out Ong J. and his assessors were not prepared to accept $35,000 a month as a reasonable rent for the kind of hotel envisaged without the acquired land. They were of the opinion that a monthly rent of the order of $40,000 would be fair and reasonable.

If the right figure was not 40,000 but 45,000 dollars a month, the method of calculation put forward produces a radically different result.

Then the loss of rent would be 5,000 dollars a month and the figures would be:—

Annual loss of rent	$ 60,000
Less Municipal assessment	$ 15,600
	$ 44,400
At 8 years' purchase	$355,200
Less capital outlay	$150,000
	$205,200
Less value of acquired land	$202,280
	$ 2,920

This notional loss would, their Lordships were informed, be offset by factors for which Ong J. made no allowance. This calculation shows the vital importance of an accurate estimation of the loss of rent and also that it does not necessarily follow that an annual loss of rent would result in a loss due to severance.

On a calculation in accordance with that adopted above, it is apparent that if the rent was slightly above 45,000 dollars a month there would be no loss due to severance, according to this method.

The Court, as has been stated, did not accept the figure of 35,000 dollars a month offered by the prospective tenant as a reasonable rent for the hotel land alone. It does not appear that they had any evidence before them directly bearing on the question what would have been a reasonable rent. The prospective tenant gave evidence that the Federal Hotel paid 19,000 – 20,000 dollars a month in rent and had only 90 rooms compared with the 204 of the proposed hotel. One assessor expressed the opinion that the proposed hotel having more than double the number of rooms should be able to command 40,000 dollars a month in view of the fact that its building and parking facilities were far better than the Federal Hotel.

Applying the same rate per room as for the 90 rooms at the Federal Hotel, the monthly rent would be 44,880 dollars per month without making any allowance for the superior locality and better parking facilities.

In so far as there was any evidence of the appropriate rental of the hotel alone, in the view of their Lordships' Board this pointed to a rent in excess of 44,880 dollars a month.

No attempt was made to ascertain the values according to the most direct method. The market value of the acquired land was assessed at 2 dollars a square foot. The market value of the hotel land was not separately assessed but no reasons were put before their Lordships for supposing that this land in 1957 had a higher market value than other land in the neighbourhood which was estimated at 2 dollars a square foot. No attempt was made by the appellants to establish that if the direct method was used, it revealed a loss of value due to severance.

The learned Chief Justice in the course of his judgment said "If the probable effect of Income Tax be disregarded here, the Judge's figure of 276,240 dollars would fall to be increased to about 560,000 dollars making the diminution of value of the total land by reason of the severance alone about 358,000 dollars or about 2 dollars a square foot which is the same as the total market value of the acquired swimming pool land."

This in his opinion was sufficient to call for some enquiry as the validity of that course of reasoning.

While recognising that in some cases the loss in value of one piece of land as a result of severance may exceed the value of the land taken away, in the circumstances of this case in their Lordships' view the fact that on the appellants' calculations the loss in value of the hotel land was so very substantial as a result of being deprived of the use for recreational purposes of a piece of land not contiguous to the hotel land but to which there was access over land in other ownership gives rise to grave doubts as to the accuracy of their claim.

If indeed the hotel land had after severance the same market value as the acquired land, it would mean if this claim was well founded, that before severance its value was about 4 dollars a square foot, i.e. nearly double on account of being able to use the land which was acquired for recreational purposes. If on the other hand the value of the hotel land before severance was 2 dollars a square foot, the result of severance would on the appellants' claim reduce the value of the hotel land to a negligible amount or nil.

Further on a rental basis of 40,000 dollars for the hotel land alone, the gross realisation value of the hotel land with the hotel constructed upon it, amounts to 2,545,728 dollars, i.e.

Monthly rental	$ 40,000
Less for furniture	$ 4,166
	$ 35,834
Less Municipal assessment at 26%	$ 9,316
Net monthly rent	$ 26,518
Annual rent	$ 318,216
At 8 years' purchase	$2,545,728

Since the hotel buildings cost 2,900,000 dollars it follows that the value of this hotel land would become a minus quantity and the expenditure of this magnitude on the hotel was demonstrably uneconomic. No evidence was given on the part of the appellants to the effect that the hotel was so far constructed by the 11th October 1957 that the only reasonable course to follow was to complete it. Ong J. in the course of his judgment did say that the hotel was then in course of construction, and referred to a letter from the prospective tenant to the appellants dated 19th March 1957 in which the prospective tenant referred to "the new hotel at Treacher Road work on which has now started." Apart from this letter there was no evidence before Ong J. from which it could be inferred that in October 1957 the hotel was in course of construction. The appellants' sought before their Lordships to draw an inference that the hotel was in course of construction on the 11th October 1957 from forecasts by the appellants in correspondence as to the date of completion. Those forecasts were entirely unjustified by events, the hotel which it was anticipated would be completed in March or April 1958 not being fit for occupation until May 1959 (when it appears that the restaurant and ballroom were not ready and only 3 floors of a 7 storey hotel furnished) and not completed until some time in 1960. Their Lordships in the circumstances do not consider that any such inference can properly be drawn.

The learned Chief Justice in the course of his judgment said that on the 11th October 1957 "actual development of the land had not commenced. Everything was in the planning stage." ... "No construction had been commenced on any of the land, either the hotel land or the swimming pool." Hill, Judge of Appeal agreed with him and Neal J. expressed himself to be in complete agreement with the Chief Justice's assessment of the facts.

The appellants attacked these findings of the Chief Justice. Their Lordships find it difficult to believe that such positive statements of fact were made by him and agreed to by the other members of the Court without there being any basis for them.

The appellants' architect and their surveyor gave evidence before the Court. Neither of them gave any evidence to the effect that the hotel was in the course of construction in October 1957. As has been stated, the only evidence to this effect, if it can be so described, is the statement "work on which has now started" in the letter of the 19th March 1957 from the prospective tenant to the appellants.

If in fact the hotel was in October 1957 in course of construction, it is indeed surprising that this was not stated in evidence by the appellants' witnesses.

Other evidence before the Court points to the conclusion that it was not then being built. After the hotel land had been bought early in 1956 for 89,500 dollars (approximately half a dollar per square foot) a plan was proposed showing the layout of the proposed hotel (Exhibit A2). This plan made provision for a swimming pool, petrol kiosk and car park.

The Planning Authorities required the petrol kiosk to be re-sited at the rear of the hotel. The appellants had another plan (Exhibit A3) prepared to meet their wishes. In addition to moving the petrol kiosk, on this revised plan the appellants voluntarily changed the site of the hotel and placed it further to the east, despite the fact that this involved the elimination of the swimming pool shown on the plan (A2). This plan (A3) was approved by the Planning Authorities in June 1956. On the architect's advice, the appellants sought other land for a swimming pool. They then bought the land the subject of compulsory acquisition together with other land. They sold the other land at a price which left 60,000 dollars (a price of just over half a dollar a square foot) attributable to the land later compulsorily acquired.

In 1957 a further plan (Exhibit A1) was proposed. The architect put the date of that plan at "around August 1957". It was, no doubt, prepared with the object of showing a possible layout of a swimming pool etc. on the land later compulsorily acquired but it is significant that it shows the hotel land and the outline of the hotel in a different place and of a different shape from that shown on either of the other two plans. It also shows the site of a ballroom and restaurant neither of which was shown on the other plans. On this plan a smaller area coloured yellow was reserved for a car park and it is apparent that there is space in the area coloured pink which was included in the car park in the plans A2 and A3 for a swimming pool of at least the size of that shown on the plan.

Their Lordships were unable to ascertain whether the hotel when built was in the shape shown in the plan A1 or that in A2. Neither in A2 or A3 was provision made for a ballroom and restaurant. The reference by the tenant to the ballroom and restaurant not being ready in May 1959 may be some indication that the

hotel was built in the shape shown on A1. If this were the case, it would indicate, as the approval of the Planning Authorities had not by October 1957 been obtained for the plan A1, that construction of the hotel started later than that date.

If a firm decision had been reached to build a hotel on the site and of the shape shown on the plan A3, it is difficult to understand why the architect should show a hotel of a different shape and on a different site on the plan A1. If no firm decision had been needed as to the shape or size of the hotel, it would indeed be odd if by October 1957 the construction of the hotel had proceeded very far and the time it took to complete the hotel makes it improbable that on that date construction had so far proceeded that the only reasonable course to follow was to complete it.

Their Lordships see no reason to reject the conclusions of the Court of Appeal that on the 11th October construction had not started. Nor do they see any reason to reject the other findings of the learned Chief Justice. Ong J. expressed the opinion that the swimming pool and recreation ground could not be carved out of the hotel land. If the building of extras had not been started, it would have been possible to revert to the layout shown on plan A2 which contains a swimming pool. If building operations had started for a hotel of the shape shown on the plan A1, it is apparent that provision could have been made for a swimming bath on the area coloured pink.

The Chief Justice said "It is clear, however, that a swimming pool of some sort could have been provided on the hotel land." Their Lordships see no reason to question this statement.

If the provision of the recreational facilities such as were contemplated on the acquired land, were of such importance to the hotel, one would have expected the appellants, if such facilities could not be provided in an adequate degree on the hotel land, to have endeavoured to secure other land for that purpose. No evidence was given that any such attempt was made. Mrs. Pereira, who owns some land adjoining the hotel land, testified that in August 1957 the appellants sought to buy the land. She decided not to sell but undertook to give them the first offer if she sold her land in future. The appellants made no approach to her after the acquisition.

The Court of Appeal unanimously rejected the award made by Ong J. The appellants have failed to satisfy their Lordships' Board that they were wrong in so doing.

The appellants' claim was based initially on a rental difference of 15,000 dollars a month. That was not accepted by the Court. They did not accept that 35,000 dollars was a reasonable rent for the hotel. The appellants produced no evidence which established a reasonable rent in excess of 35,000 dollars. Such evidence as there was pointed to a rent in execess of 44,880 dollars a month.

It was for the appellants to establish that they had suffered damage in the diminution of the value of the hotel land due to severance. Their Lordships agree with the majority of the Court of Appeal that the appellants have failed to prove that they suffered any such damage.

Their Lordships will, therefore, report to the Head of the Federation of Malaya their opinion that this appeal should be dismissed and that the appellants should pay the costs of this appeal.

Appeal mismissed.

Solicitors: *Coward Chance & Co.; Wray Smith & Co.*

NG ENG HIAM v. NG KEE WEI & ORS.

[C.A. (Thomson C.J., Hill and Syed Sheh Barakbah JJ.A.) December 3, 1962]

[K.L. — Companies (Winding-up) No. 2 of 1961]

Company Law — Private company — Strained relationship between directors — Whether just and equitable to order winding-up — Principles to be applied — Companies Ordinance, 1940, s.166(6).

The appellant and the 2nd respondent were the subscribers to a company with a fully paid up capital of $1,000,000 divided into 1,000 shares of $1,000 each. Each of them, with members of their respective families, holds 50% of the shares. The Articles of Association provided that the management and control of the company should be equally divided between the two subscribers who became the permanent directors. There was no provision for the appointment of a third director, nor any arbitration clause. In May 1957, the general manager of the company and eldest son of the 2nd respondent asked for a special bonus for services rendered by him but was opposed by the appellant. In September 1957, the 1st and 2nd respondents gave a contract for selling timber to a third party without the appellant's knowledge. These two incidents led to a strained relationship between the appellant and the 2nd respondent which resulted in minor incidents such as the removal of the company books to another office. In the circumstances, the appellant made an application for the winding-up of the company on the ground that it is just and equitable that it should be wound up. In the court below, the learned judge dismissed the application. On appeal,

Held: (1) the parties had not reached such a state of complete deadlock that it would be impossible to carry on the business any longer;

(2) since there was no allegation of dishonesty, inefficiency misconduct or failure to keep proper accounts, it was not just and equitable that the company should be wound up.

Decision of Ong J. *sub nomine Re Semantan Estate (1952) Ltd.* [1962] M.L.J. 285 affirmed.

Cases referred to:—

(1) *In re Yenidje Tobacco Co. Ltd.* [1916] 2 Ch. 426.

(2) *Loch* v. *John Blackwood, Ltd.* [1924] A.C. 783, 788.

(3) *Anglo-Continental Produce Co. Ltd.* [1939] 1 All E.R. 99.

(4) *Bleriot Manufacturin- Air-craft Co. Ltd.* 32 T.L.R. 253-5.